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In the Supreme Court
of the United States

OCTOBER TERM, 1968

No. 1054

HAROLD G. CHILDS, *Petitioner*,

v.

STATE OF OREGON, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

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In the Supreme Court
of the United States

OCTOBER TERM, 1968

No._____

HAROLD G. CHILDS, *Petitioner*,

v.

STATE OF OREGON, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Oregon in the above entitled case (entitled below State of Oregon, Plaintiff-Respondent, versus Harold G. Childs, Defendant-Appellant) entered on November 20, 1968, affirming the judgment of conviction and sentence imposed upon petitioner by the Circuit Court of the State of Oregon for Multnomah County.

CITATIONS TO OPINIONS BELOW

The majority and dissenting opinions of the Supreme Court of the State of Oregon (printed in Ap-

pendix A) are reported at 87 Adv. Sh. 495, — Or. —, 447 P.2d 304 (1968).

JURISDICTION

The judgment of the Supreme Court of the State of Oregon was entered on November 20, 1968. Petitioner's Petition for Rehearing in that Court (printed in Appendix C) was denied on December 17, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (3).

QUESTIONS PRESENTED

1. Can the Supreme Court of the State of Oregon disregard and refuse to apply *Redrup* v. *New York*, *Aday* v. *U. S.*, *Books, Inc.* v. *U. S.*, *A Quantity of Copies of Books* v. *Kansas*, and the numerous cases following them, to the paperback novel "Lesbian Roommates" which is legally indistinguishable from the comparable books held not obscene by this Court?

2. Is ORS 167.151 (printed in Appendix B) on its face and as construed by the Oregon Supreme Court, in violation of the First, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States?

3. Can a retail cigar-store operator selling paperback books which he has not read, consistent with due process of law, be compelled at risk of criminal conviction "to know" how a court might ultimately draw the dim and uncertain line between obscenity and con-

stitutionally protected expression as to a particular book, where similar books have been held not obscene?

4. Is it consistent with due process requirements of the Fourteenth Amendment and the constitutional standards for judging obscenity enumerated by the Supreme Court to render a judgment of conviction against an accused without proof in the record that the accused knew the contents of the material or believed that the material involved violated the law, and where books of a similar character have been held to be constitutionally protected?

5. Is it consistent with due process of law, and the constitutional standards for judging obscenity, to permit Oregon to convict petitioner on the evidence of the book alone, without offering any proof of contemporary community standards, prurient appeal of the book taken as a whole, customary limits of candor and utter lack of social importance?

6. Does the use of petitioner's "admissions," concededly secured in violation of *Massiah* v. *United States*, 377 U.S. 201, as the major evidence of petitioner's scienter, require reversal under *Chapman* v. *California*, 383 U.S. 956?

7. Was petitioner denied equal protection of the laws when the Oregon courts permitted petitioner to be convicted while four other defendants and petitioner in the eight consolidated cases, who sold seven other virtually identical type books with substantially indistinguishable evidence of scienter, were either ac-

quitted by the jury or had their cases dismissed by the court after the jury could not agree on a verdict.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional and statutory provisions involved are the First, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States and Oregon Revised Statutes § 167.151 (printed in Appendix B).

STATEMENT OF THE CASE

On December 7, 1964 Portland Police Officer Prunk (Tr. 188, 198) proceeded on instructions from the District Attorney's Office (Tr. 228, 237) to "get a specimen or a sample from each bookstore in the downtown area which we had previously discussed as being the bookstores that had the largest supply of the type of book of Lesbianism or that depicted partially clad girls together on the cover, or by their title appeared to deal in homosexuality or heterosexual . . ." (Tr. 161) to present to the grand jury for "their evaluation" (Tr. 162, 227, 228). The books were selected by Officer Prunk because in his opinion they dealt with lesbianism (Tr. 125). Eight books were purchased from five downtown Portland cigar stores handling paperback books.

The eight books were presented to the January, 1965 Multnomah County Grand Jury which on January 27, 1965, handed down eight indictments, one for

each of the books. The impetus for the prosecution came from the "Citizens for Decent Literature" (Tr. 45-54, 60).

As soon as the secret indictments were handed down warrants for the arrest of the five retail dealers were issued. Armed with a warrant for petitioner's arrest, four Portland Police Officers in plain clothes went to petitioner's place of business to arrest him (Tr. 312). While two of the officers remained outside with the warrant (Tr. 296), the other two officers went inside petitioner's store for about fifteen minutes (Tr. 312) for the express purpose "to go in to see whether [they] could pick up some additional information or self-incriminating statements before [they] made the arrest" (Tr. 297). This procedure to elicit after-indictment incriminating admissions or confessions of petitioner was done under specific instructions from the District Attorney's Office (Tr. 140-141, 149-150, 213-214, 237, 296-297, 306). No warnings were first made to petitioner of his constitutional rights not to testify against himself and his right to counsel.

Petitioner made statements to the officer that the book Lesbian Roommates was "a good seller" and that it was comparable to the book Candy, "written in France" and Fanny Hill which was "the best seller he had in the store" (Tr. 300-301). This testimony was offered in evidence, over petitioner's objection that it violated petitioner's constitutional rights under the Fifth, Sixth and Fourteenth Amendments (Tr. 293,

300, 312, 322-323), as evidence of petitioner's "scienter" (Tr. 142-147) and was admitted by the trial court for that express purpose (Tr. 144). In his closing argument to the jury, the prosecuting attorney quoted this testimony over and over again, as demonstrating petitioner's scienter (Tr. 845-848, 875, 898, 902, see Appendix C, pp. C6-C8).

Despite the clear use of this testimony as the major element to prove petitioner's scienter, the Oregon Supreme Court held that the evidence, admittedly unconstitutional, related *solely* to the question of whether petitioner "stocked and sold the book" and accordingly "there was no reasonable possibility that the evidence complained of might have contributed to defendant's conviction" (Appendix A, p. A-16).

A demurrer was filed to the indictment (the book Lesbian Roommates having, by stipulation, been made a part of the indictment) on the grounds that the provisions of ORS 167.151 on its face and as applied herein are unconstitutional under the Constitution of the United States, Amendments I, V, VI and XIV. After reading the book, the trial court overruled the demurrer stating "It is evident that the authors and/or publishers attempted to stay on the right side of the somewhat ill defined border line. It is apparent that they failed to do so." (Tr. 65a-65b, 73).

The State's case in chief, in addition to petitioner's statements relating to his alleged scienter, consisted solely of placing the book "Lesbian Roommates" in evidence. The prosecution proceeded on the theory

that "the jury itself is the decider of its community standard" (Tr. 66); "the jury is the reflector of the community standards" (Tr. 316). Consistent with this attitude the prosecuting attorney argued to the jury in closing that it was up to the jury "to set a minimum standard of obscenity" (Tr. 839).

At the conclusion of the State's case in chief, petitioner made a motion for judgment of acquittal (Tr. 331-332, 338) on the grounds set forth in the demurrer and on the additional grounds that there was no evidence, consistent with due process of law, to support a conviction because there was no evidence of community standards, of what the appeal of the predominant theme of the book taken as a whole might be, of whether or not the book itself substantially exceeded customary limits of candor, and no evidence that the book lacked or was utterly without redeeming social value. Further said motion was predicated upon the complete absence of substantial evidence of scienter. The Oregon Supreme Court, in its earlier decision of *State* v. *Jackson*, 224 Or. 337, 343-345, 356 P.2d 495 (1960) citing *Smith* v. *California*, 361 U.S. 147, 80 S. Ct. 215, 4 L. Ed. 2d 205 (1959), specifically had indicated "the type of scienter in an obscenity prosecution is obviously something of a higher quality than that which is involved in non-constitutional criminal trials" (Tr. 338). The motion for judgment of acquittal was denied by the Court (Tr. 356).

At the conclusion of the entire trial, petitioner, having presented competent expert testimony that the

book in question did not have as its predominant theme an appeal to prurient interest, did not substantially exceed customary limits of candor applying contemporary national community standards, and was not utterly without redeeming social importance, moved for judgment of acquittal (Tr. 813). The motions reiterated the grounds argued in support of the motion for judgment of acquittal and those set forth in the demurrer (Tr. 813-821). The motion was denied by the trial judge (Tr. 837).

The court thereupon instructed the jury. Petitioner took numerous exceptions to the instructions (Tr. 921-930). Having permitted the statements of petitioner obtained in violation of *Massiah*, in which petitioner compared "Lesbian Roommates" with "Fanny Hill" and "Candy," the trial court refused to instruct the jury, as requested by petitioner (Tr. 979), that "Fanny Hill" and "Candy" were not obscene, and instead permitted the jury to decide whether such comparison books were or were not within customary limits of candor (Tr. 918). Appropriate exception was taken by petitioner to thus delegating to the jury the legal functions properly the duty of the court (Tr. 925-926). This procedure was aggravated by the trial court's rejecting evidence of court decisions holding comparable paperback novels not obscene, as such testimony was offered both independently and as part of the expert testimony of Professor Bierman (Tr. 764-770), and further rejecting in evidence the book Fanny Hill and testimony by

experts comparing "Lesbian Roommates" with "Fanny Hill" (Tr. 461-465, 486-490).

The jury received eight books sold by five downtown Portland cigarstore operators (petitioner and four others) in eight cases consolidated for trial. All eight books were substantially the same, and the evidence of scienter as to the five defendants (including statements solicited from all five in violation of *Massiah*) was also substantially identical as to all defendants. Nevertheless, the jury returned its verdict on the eight books as follows:

C. No.	*Defendant*	*Name of Book*	*Verdict*
44746	Hayse	Lesbian Haven	Not Guilty
44747	Mamer	Her Raging Needs	Not Guilty
44748	Childs	Beds of Lesbos	Hung Jury
44749	Mamer	Dancehall Dyke	Hung Jury
44750	Rosenlund	The Abnormal Ones	Not Guilty
44751	Childs	Lesbian Roommates	Guilty
44752	Ramp	The Pleasures We Know	Hung Jury
44753	Ramp	A Kind of Marriage	Not Guilty

On April 29, 1966 the trial court dismissed the indictments in the three cases in which the jury had been hung.

After the verdict but before judgment, petitioner filed his motion in arrest of judgment and for acquittal. In addition to grounds previously raised, petitioner urged that under the circumstances his conviction constituted a denial to him of the equal protection of the laws guaranteed by the Fourteenth Amendment.

All the foregoing constitutional issues, and others, were presented to the Oregon Supreme Court in twenty-nine separate Assignments of Error, set forth in Appellant's Abstract of Record and Brief. In addition to deciding each such matter adversely to petitioner, the Oregon Supreme Court applied *Ginzburg* v. *United States*, 383 U.S. 463, 86 S. Ct. 942, 16 L. Ed. 2d 31 (1966) to petitioner, operator of a retail tobacco and magazine business, under circumstances where the policeman purchasing the book selected it voluntarily and without any solicitation whatsoever by petitioner.

In addition, the Oregon Supreme Court construed ORS 167.151(4) (Appendix B) to permit the inference of petitioner's scienter of the allegedly obscene character of the book taken as a whole from the cover or back of the book alone, rejecting petitioner's contention that to permit such an inference as proof of scienter would constitute a denial of due process of law.

REASONS FOR GRANTING THE WRIT

I

The Oregon Supreme Court has refused to follow and apply Redrup, Aday, Books, Inc., A Quantity of Books v. Kansas, and other decisions following them, to the book "Lesbian Roommates" which is legally indistinguishable from the books held non-obscene in those cases.

The Oregon Supreme Court has decided petitioner's guilt by applying constitutional standards for

judging obscenity, in direct contradiction of the applicable decisions of this Court.[1] The Federal Constitution should be applied in Oregon in the same manner as in the other States of the Union.

II

Even assuming "Lesbian Roommates" is "obscene in the constitutional sense" it would be a denial of due process and constitutional standards for judging obscenity to convict petitioner for selling a book where he did not know the contents nor believed the material to violate the law and where books of a similar character have been held constitutionally protected.

This Court granted certiorari in *Redrup* on the following limited question on the hypothesis that the material involved was "obscene in the constitutional sense:"

> "4. Whether, consistent with the due process requirements of the Fourteenth Amendment and the Constitutional standards for judging obscenity enunciated by the Supreme Court, a judgment of conviction can be rendered against an accused without proof in the record that the accused knew the contents of the material or believed that the material involved violated the law, and where books of a similar character have been held to be constitutionally protected by the courts of the

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[1] *Redrup* v. *New York*, 386 U.S. 767, 87 S. Ct. 1414, 18 L. Ed. 2d 515 (1967), *Aday* v. *United States*, 388 U.S. 447, 87 S. Ct. 2095, 18 L. Ed. 2d 1309 (1967), *Books, Inc.* v. *United States*, 388 U.S. 449, 87 S. Ct. 2098, 18 L. Ed. 2d 1311 (1967), *A Quantity of Copies of Books et al* v. *Kansas*, 388 U.S. 452, 87 S. Ct. 2104, 18 L. Ed. 2d 1314 (1967).

State." (384 U.S. 916, 86 S. Ct. 1362, 16 L. Ed. 2d 438)

Because this Court subsequently considered that hypothesis invalid, it did not reach the critical issue on which it granted certiorari.

Accordingly, in the event this Court does not believe *Redrup* et al controlling and considers "Lesbian Roommates" "obscene in the constitutional sense," then the considerations which led this Court originally to grant certiorari in *Redrup*, remain equally compelling for granting certiorari now in this case. Particularly is this true when the Oregon Supreme Court improperly applied *Ginzburg* v. *U. S.*, 383 U.S. 463, 86 S. Ct. 942, 16 L. Ed. 2d 31 (1966) to a retail dealer, under circumstances where a policeman purchased a book voluntarily without any solicitation whatever by petitioner.

III

It is inconsistent with due process of law to convict petitioner with no evidence of obscenity other than the book "Lesbian Roommates" itself; no evidence of appeal to prurient interest of the predominant theme of the book taken as a whole applying contemporary community standards, no evidence of customary limits of candor, and no evidence of lack of social importance.

While this Court in *Mishkin* v. *New York*, 383 U.S. 502, 510, 86 S. Ct. 958, 16 L. Ed. 2d 56, 62 (1966) impliedly recognized with approval the hold-

ing in *United States* v. *Klaw*, 350 F.2d 155 (C.A. 2, 1965) that *res ipsa loquitur* does not apply to obscenity prosecutions and that more than mere "autopical" evidence of the book itself is required to convict, the Oregon Supreme Court, affirming the trial judge, expressly rejected *Klaw*.

If the judgment in this case stands, Oregon jurors will be deemed competent to furnish in the jury room, without opportunity for petitioner to cross-examine,[2] their own evidence or assumptions of national community standards, for purposes of determining both prurient appeal of the material taken as a whole and whether the material substantially exceeds customary limits of candor, and whether the book utterly lacks social value. Such holding conflicts with other rulings, such as in *Luros* v. *U. S.*, 389 F.2d 200 (C.A. 8, 1968). In dealing with lesbian books identical to "Lesbian Roommates," the Court of Appeals for the Eighth Circuit held it improper to permit a conviction to stand without "independent evidence of prurient appeal *and* patent offensiveness," concerning which the government did not "offer any competent evidence outside of the books themselves." (389 F.2d at 205).[3]

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[2] During jury deliberations the foreman reported in writing to the trial judge that "Mr. Darrah recently converted to the United Brethren Church, has brought certain prejudices to this trial" and "Miss McQuiston's thoughts, as she expresses them, are very difficult for us to follow." (Ex. ZZ).

[3] Not only has *Klaw* been applied specifically to lesbian type books identical to "Lesbian Roommates" in *U. S.* v. *Luros, supra,* but as well to a variety of other allegedly ob-

This Court has recently affirmed that a conviction in absence of substantial evidence is a denial of due process, *Thompson* v. *City of Louisville*, 362 U.S. 199, 80 S. Ct. 624, 4 L. Ed. 654 (1960) and *Garner* v. *Louisiana*, 368 U.S. 157, 82 S. Ct. 248, 7 L. Ed. 2d 207 (1961). Lockhart and McClure, after years of

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scene materials. Thus, in *In re Albert J. Giannini and Kelly Iser* on habeas corpus, 69 A.C. 588, 72 Cal. R. 655, 446 P.2d 525 (1968), *Klaw* was applied to a topless dancer. In *Hudson* v. *United States*, 234 A.2d 903 (D.C. Ct. of App. 1967) it was applied to an allegedly obscene burlesque show, the court cogently commenting:

> "A guilty verdict in an obscenity trial should not be a legal expression of revulsion by the local community from which the jury is drawn. If a case is submitted to the trier of fact without first establishing the community standards by competent evidence to which the trier may refer, the verdict at best will be based on the prevailing customs in a limited geographical area and, at worst, upon the "subjective reflection of taste or moral outlook of individual jurors or individual judges. * * * [T]he determination of obscenity is for juror or judge, not on the basis of his personal upbringing or restricted reflection or the particular experience of life, but on the basis of 'contemporary community standards.'" Smith v. People of State of California, 361 U.S. 147, 165, 80 S. Ct. 215, 225, 4 L. Ed. 2d 205 (1959), concurring opinion of Mr. Justice Frankfurter. These standards must be established by relevant evidence at trial." (234 A.2d at 906).

Similarly *Klaw* was applied in *Ramirez* v. *State*, 430 P.2d 826 (Okl. Cr. 1967) to the motion picture film "Night of Lust" and the film trailer for "Sexus" and in *City of Phoenix* v. *Fine*, 4 Ariz. App. 303, 420 P.2d 26 (1966) to several nudist magazines (the allegedly obscene pocketbooks "Harlot," "Bordello Queen," "The Plaything" and "Passion Pen" were already declared not obscene by the trial court.)

Due process should require independent proof other than the book itself of contemporary community standards, as they determine prurient appeal and the limits of candor, and the utter lack of social importance; otherwise, the trier of facts whether trial judge, juror, or appellate judge, is left with two impossible alternatives as articulated in *City of Phoenix* v. *Fine*, *supra*:

reflecting on the law of obscenity, concluded in "Censorship of Obscenity: The Developing Constitutional Standards," 45 Minn. Law Review 5, 98 (1960), "although in 1954 we suggested that admission of such evidence [expert testimony] was probably not a constitutional requirement, we are now convinced that this evidence is of such crucial importance that its admission ought to be raised to the level of a constitutional requirement. Indeed, without such evidence in the record, appellate courts will often find it impossible to review intelligently the obscenity decisions brought before them."

Due process under the Fourteenth Amendment should not be applied differently in California, Ari-

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"To present him with the pubications alleged to be obscene and no other evidence is to leave him the choice of two impossible alternatives neither of which is consistent with our philosophy of adversary proceedings. He could rely on his own views and experience alone to determine the question. This puts the control of publications in the hands of a single man. His own concepts would control. For instance, his view on what appeals to the prurient, his view of what is the customary candor of the community, and his view of what has social importance would be the basis of the decision because nothing else was presented to him. These views in reality would involve his personal views. Or alternatively, he could read psychology works, literary criticism, social surveys or anything else that seems to him to be relevant and then based on his interpretation of these, decide. This would be a sort of hidden judicial notice of his resources. The adversaries would have no chance to challenge these "experts' or to present contrary views. The Supreme Court of Arizona has forbidden this kind of taking of judicial notice even when done openly. Utah Const. Co. v. Berg, 68 Ariz. 285, 205 P.2d 367 (1949). The Court must be presented with some evidence on each element to aid it in this determination of fact." (420 P.2d at 30).

zona, Oklahoma, the District of Columbia, the 8th and 2nd Circuits (where petitioner on the record before the court would have been acquitted) than due process is applied in Oregon. This Court should resolve these conflicting standards of due process. Petitioner's guilt should not depend upon geography.

IV

ORS 167.151 (4) on its face conflicts with due process of law in permitting a presumption of scienter from the "blurbs" and advertising on the cover or back of a book or magazine.

The Oregon Supreme Court construed ORS 167.151 (4) (Appendix B) as properly permitting a presumption of petitioner's scienter to be drawn from the cover and back of the book (Appendix A, p. A-10). Such a construction differs substantially from the suggestion of this Court in *Smith* v. *California*, 361 U.S. 147, 80 S. Ct. 215, 4 L. Ed. 205 (1959) that scienter in obscenity cases meant actual knowledge of the obscene content of the material, a belief that material in fact was in violation of the law.[4]

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[4] *Manuel Enterprises, Inc.* v. *Day*, 370 U.S. 478, 493, 82 S. Ct. 1432, 8 L. Ed. 2d 639 (1962) held proof of scienter insufficient when publisher's president had not actually seen the material advertised in his publications so that he could "judge for himself" its alleged obscenity.

ORS 167.151 (4) is specifically criticized in the Comment, "Legislation—Obscene Literature," 18 Vanderbilt Law Rev. 2084, 2086-2088 (1964-5), where the author concludes: "The effect of this statute is to significantly decrease the amount of circumstantial evidence necessary to establish the requisite awareness."

Where First Amendment freedoms are involved, due process requirements relating to scienter should not be relaxed as they have been by ORS 167.151(4), as construed by the Oregon Supreme Court.

V

The Oregon Supreme Court violated Chapman v. California, 383 U.S. 956 when it held that statements elicited from petitioner in violation of Massiah v. United States and used as the state's major evidence of scienter went solely to prove petitioner "stocked and sold the book" and therefore "there was no reasonable possibility that the evidence complained of might have contributed to petitioner's conviction."

Police testimony of petitioner's 'admissions," secured under circumstances admittedly violative of plaintiff's constitutional rights under *Massiah*, were offered and received in evidence as the major part of the state's proof of petitioner's scienter. The prosecuting attorney argued over and over again to the jury, that these statements were clear evidence of petitioner's scienter (See Appendix C, pp. C6-C8). On such record it is impossible to reconcile the Oregon Supreme Court's conclusion that "its only possible prejudice would be as an admission that defendant stocked and sold the book" and accordingly "there was no reasonable possibility that the evidence complained of might have contributed to defendant's convictim" (Appendix A, p. A-16), with the due process requirements of *Chapman* v. *California*, 383 U.S. 956, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967).

CONCLUSION

For the foregoing reasons this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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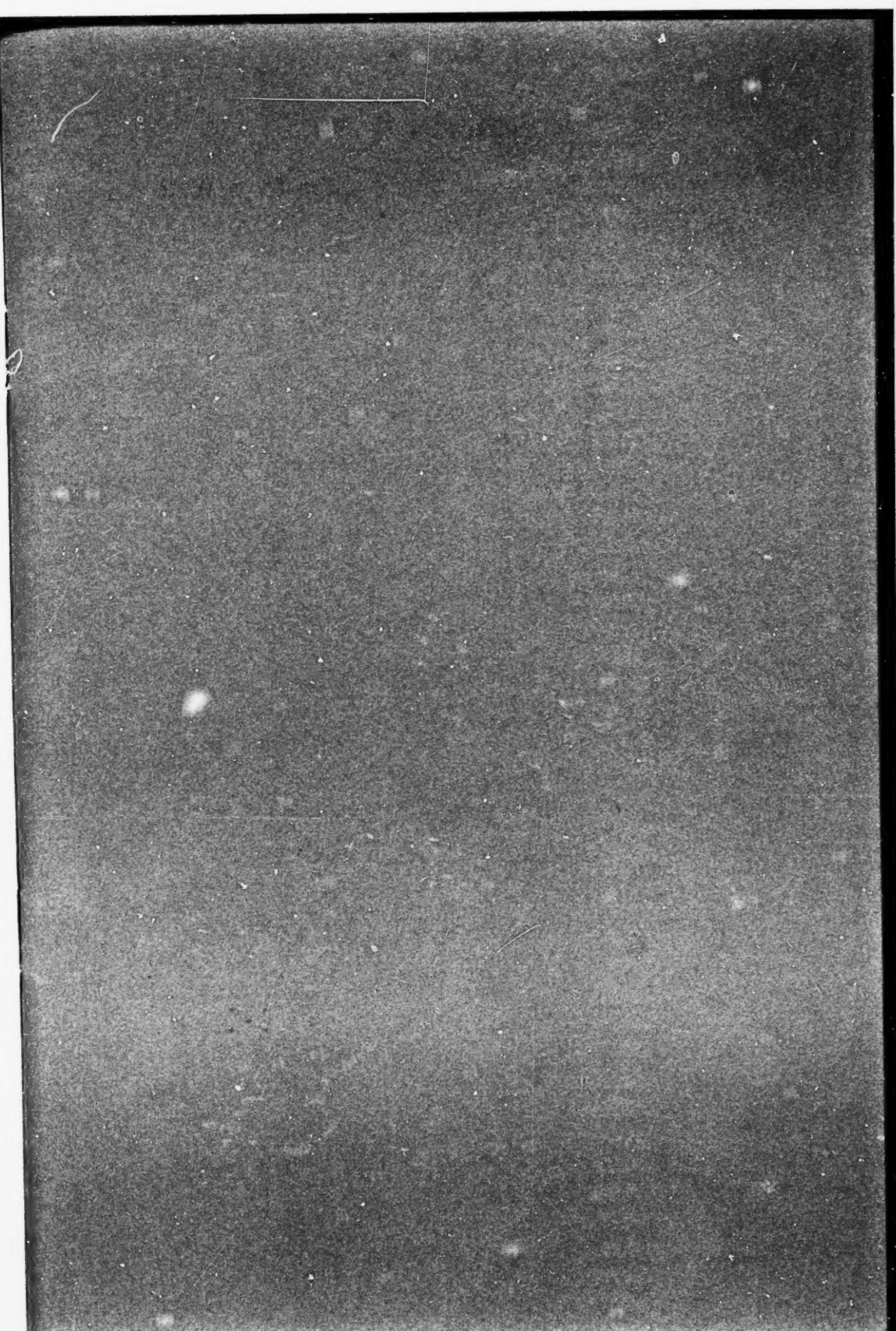

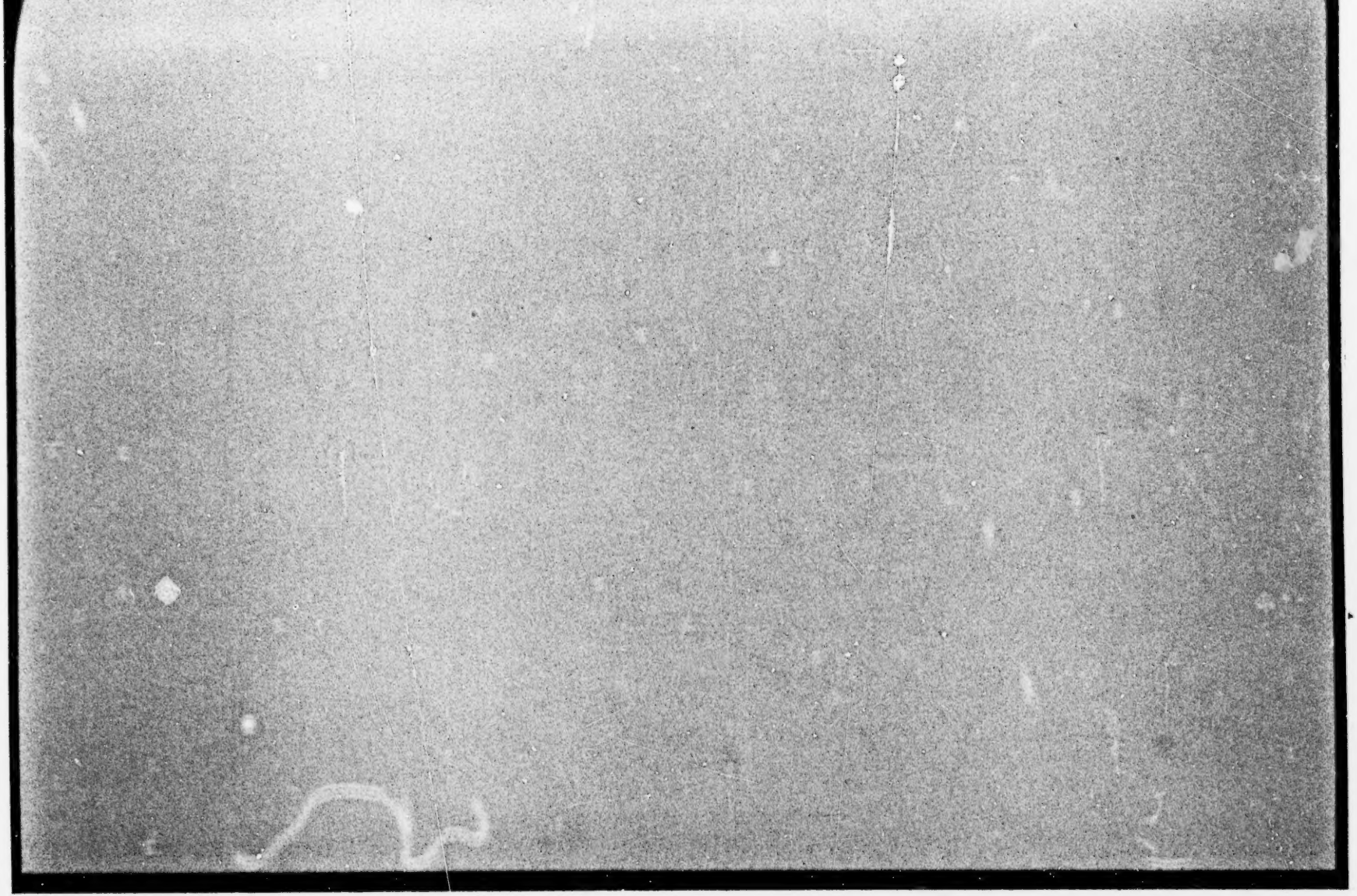

APPENDIX A

Opinions Below
No. 9008—November 20, 1968

IN THE SUPREME COURT OF THE STATE OF OREGON

IN BANC

STATE OF OREGON, *Respondent*, *v.*
HAROLD G. CHILDS, *Appellant*.

Appeal from Circuit Court, Multnomah County.

CHARLES S. CROOKHAM, Judge.

Argued and submitted April 2, 1968.

Paul R. Meyer, Portland, argued the cause for appellant. With him on the brief were Kobin & Meyer, Portland.

Jacob B. Tanzer, Deputy District Attorney, Portland, argued the cause for respondent. With him on the brief was George Van Hoomissen, District Attorney, Portland.

Barnes H. Ellis, Howard M. Feuerstein and John C. Wright, Portland, filed a brief for the American Civil Liberties Union of Oregon as amicus curiae.

Before PERRY, Chief Justice, and MCALLISTER, SLOAN, O'CONNELL, GOODWIN, DENECKE and HOLMAN, Justices.

AFFIRMED.

HOLMAN, J.

Defendant, the operator of a retail tobacco and magazine business, was convicted of selling obscene

written material in violation of ORS 167.151.① The subject of the sale was a paper-bound book entitled "Lesbian Roomate." This is an appeal from that conviction.

One of the defendant's principal contentions is that the material is not obscene as a matter of law and, therefore, may not be proscribed without restricting freedom in the dissemination of information in violation of the First Amendment of the United States Constitution. It is clear that obscene material does not fall within the protection of the First Amendment. *Jacobellis v. Ohio*, 378 US 184, 84 S Ct 1676, 12 L ed2d 793 (1964); *Roth v. United States*, 354 US 476, 77 S Ct 1304, 1 L ed2d 1498 (1957). But in determining what constitutes obscenity this court may not adopt a more inclusive definition of obscenity than the one used by

① "(1) No person shall knowingly disseminate obscene matter. A person disseminates obscene matter if he exhibits, sells, delivers or provides, or offers or agrees to exhibit, sell, deliver or provide, or has in his possession with intent to exhibit, sell, deliver or provide any obscene writing, picture, motion picture, device, record, material or other representation or embodiment of the obscene.

"(2) As used in subsection (1) of this section, matter is obscene if, considered as a whole, its predominant theme appeals to prurient interest and if it is patently offensive and goes substantially beyond the customary limits of candor in describing or representing such matter with reference to ordinary persons.

"(3) In any prosecution for an offense under this section, evidence shall be admissible, as relevant to a determination of whether or not the predominant theme of the matter appeals to prurient interest, to show artistic, literary, scientific or educational merit of the matter.

"(4) In any prosecution for a violation of this section, it shall be relevant on the issue of knowledge to prove the advertising, publicity, promotion, method of handling or labeling of the matter, including any statement on the cover or back of any book or magazine.

"(5) Violation of subsection (1) of this section is punishable by imprisonment in the county jail for not more than six months, or a fine of not more than $1,000, or both."

the United States Supreme Court, and thus prohibit a wider range of material, without violating Federal First Amendment rights.

The United States Supreme Court has held that before material may be classified as obscene it must meet each and every one of three requirements. *Memoirs v. Massachusetts*, 383 US 413, 418, 86 S Ct 975, 16 L ed2d 1 (1966); *State v. Watson*, 243 Or 454, 414 P2d 337 (1966). First, the dominant theme of the material taken as a whole must appeal to a prurient interest in sex. Second, the material must be patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters. Third, the material must be utterly without redeeming social value.

With respect to the first requirement, the obvious purpose behind the book under consideration is to stimulate the reader sexually. The book is presented in a manner enticing to those seeking sexual excitement. It was openly displayed on racks in defendant's place of business. On the front page, in addition to the name of the book, there are pictured two nude young women and the words: "They slashed each other with the savagery of perverted desires. 'Beat me!' she cried." On the back cover is a waist and head photograph of a young woman with protuberant breasts clad only in a brassiere. Under the photograph is the following:

> "Betty was rich and perverted. Her need for another woman's love was so great that she was willing to descend from her upper crust life to the sordiness of a cheap rented room and third rate job . . . just so she could have a lesbian roomate. But when her darling took a liking to men, Betty turned to (sic) a savage beast."

On the fly leaf is the following:

> "Jill opened her mouth, felt the tongue dart inside, met it with her own. So strange. The hands squeezed her breasts. The warm thigh moved against her body, and Jill found herself wildly excited. She pushed her body against the warm thigh and returned the kiss passionately.
>
> "The hands moved along her sides, fingers trailing lightly, and then the moist lips were on her left breast. She gasped as her erect nipple was drawn into the hot mouth, the hot tongue dancing little circles around and around. Then Betty was doing the same thing to the right breast.
>
> " 'I'm on fire,' Jill whispered.
>
> "Betty raised her head. 'I'll put the fire out, honey.' "

The above-quoted material clearly demonstrates the kind of appetite to which the book is designed to appeal. The manner in which material is marketed is relevant to the determination of obscenity. In *Ginzburg v. United States,* 383 US 463, 470, 86 S Ct 942, 16 L ed2d 31 (1966), it is said:

> "This evidence [evidence of the manner of marketing], in our view, was relevant in determining the ultimate question of obscenity and, in the context of this record, serves to resolve all ambiguity and doubt. The deliberate representation of petitioners' publications as erotically arousing, for example, stimulated the reader to accept them as prurient; he looks for titillation, not for saving intellectual content. Similarly, such representation would tend to force public confrontation with the potentially offensive aspects of the work; the brazenness of such an appeal heightens the offensiveness of the publications to those who are offended by such material. * * *"

The purported story includes intimate descriptions of heterosexual or homosexual acts on the average of one every ten pages. The pages are small. The print and the margins are large. The book is a series of sexual descriptions tending to, and produced solely for, the arousal of erotic sexual fantasies; it is daydream material entirely out of touch with reality. These are characteristics commonly found in obscene material. Kronhausen, Pornography and the Law (Rev ed 1964) 306. It is calculated to stimulate sex feelings independent of one's chosen partner. M. Mead, Sex and Censorship in Contemporary Society, in New World Writings 7, 18 (3d Mentor Selection 1953). There is no doubt that the dominant theme of the material, taken as a whole, appeals to and is intended to appeal to an unusual and excessive preoccupation with sex. The entire book is for the purpose of inciting lascivious thoughts and arousing lustful desires. Roth, *supra.*

The second requirement was that the material must be patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters. Illustrative of the candor used, the book in question portrays a homosexual act between two women where one is having osculatory relations with the private parts of the other and is "greedily" making "syrupy noises." We believe material of this kind affronts national contemporary community standards.

Third, the material must be utterly without redeeming social value. We fail to discern any literary, moral or other value in the book. The supposed moral of the book is superficially inserted in the last few pages. It is obviously a sad excuse for justifying the portrayal of various kinds of sexual acts for the purpose of

arousing in the reader erotic sexual fantasies. The following is found in *Ginzburg, supra*:

> "* * * And the circumstances of presentation and dissemination of material are equally relevant to determining whether social importance claimed for material in the courtroom was, in the circumstances, pretense or reality—whether it was the basis upon which it was traded in the marketplace or a spurious claim for litigation purposes. Where the purveyor's sole emphasis is on the sexually provocative aspects of his publications, that fact may be decisive in the determination of obscenity. * * *" [383 US 470]

We find that the material is not constitutionally protected as a matter of law. Although defendant produced expert witnesses who testified that the book had literary value, we believe the witnesses' literary glasses were rose-colored by a belief that there is no such thing as obscenity and that there should be no restrictions on freedom of expression. In fact, one of the witnesses testified as follows:

> "Q And do you put obscenity among those things that are meaningful and valuable?
>
> "A Let me repeat the one thing that I indicated at the very beginning. In a long time, one of the things my study has tried to show is what obscenity can mean. I do not believe that the term obscenity has any substantive meaning of its own. It is, in my view, a legal fiction. It's a label you put on something if you want to censor it."

Another expert witness testified he had never read anything which he believed to be obscene. He said that as a theoretical matter he would grant that it was possible that an obscene book could exist, but he could not conceive of such a book.

We have examined other available contemporary "pulp" books such as "Lust Pool" and "Shame Agent" which were approved in *Redrup v. New York*, 386 US 767, 87 S Ct 1414, 18 L ed2d 515 (1967), and find the book under present consideration to have been written with considerably less restraint.

We realize that we could construe the freedom of expression provision of the Oregon Constitution, Art. I, § 8, as providing greater freedom of expression than that of the First Amendment to the United States Constitution. We do not believe there is any legal basis for such a construction.

Defendant contends that the Oregon statute is unconstitutional for the same reason that its predecessor was claimed to have been so in *State v. Jackson*, 224 Or 337, 356 P2d 495 (1960). He contends that the statute is unconstitutional because it permits conviction without proof that the obscene material will perceptibly create a clear and present danger of antisocial conduct. A majority of the court rejected this contention in *Jackson* and continues to so reject it. The Supreme Court of the United States has also rejected it. See *Roth, supra.*

Defendant also contends that the statutory or any other definition of obscenity is so nebulous that it is impossible to determine whether any particular material is obscene and thus proscribed. Admittedly, the concept of obscenity does not lend itself to precise, mathematical definition. It is not, however, alone among imprecise terms having constitutional implications. It is hardly less precise than such terms as "clear and present danger," "probable cause," "involuntariness" and "due process," all of which are in acceptable constitutional use and equally incapable of

exact definition. In *Roth* the United States Supreme Court said:

> "Many decisions have recognized that these terms of obscenity statutes are not precise. This Court, however, has consistently held that lack of precision is not itself offensive to the requirement of due process. * * *" [354 US 491]

We reject the contention that obscenity is not capable of a sufficiently precise constitutional definition.

Defendant also contends that the statute is unconstitutional because it fails to meet the Federal constitutional definition of obscenity in that it does not expressly require "national" community standards nor does it require that the material be utterly without redeeming social importance.

It is obvious that the legislature has experienced some difficulty in keeping up with the rapidly changing United States constitutional concept of what constitutes obscenity. The present statute was enacted in 1961 and amended in 1963. A prior statute was simultaneously repealed. Legislative history and the statutory language used indicates that the 1961 enactment was for the purpose of making Oregon's statute comply with *Roth* and the 1963 amendment was to bring it up to date because of the decision in *Manual Enterprises v. Day*, 370 US 478, 82 S Ct 1432, 8 L ed2d 639 (1962).

We construe the statute as requiring that the standard to be applied is a national standard. It was so construed by the trial judge and the jury was so instructed.

We also construe the definition of obscenity in the statute to require implicitly that the material be utterly without redeeming social value. The United States

Supreme Court in *Memoirs v. Massachusetts, supra,* and *Jacobellis v. Ohio, supra,* construed the *Roth* definition of obscenity to include the requirement that the material be utterly without redeeming social value. In *Memoirs* the court said as follows:

> "We defined obscenity in *Roth* in the following terms: '[W]hether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.' 354 US, at 489. *Under this definition,* as elaborated in subsequent cases, three elements must coalesce: it must be established that * * * (c) the material is utterly without redeeming social value." (Emphasis ours.) [383 US 418]

We similarly construe the Oregon statute which adopted the *Roth* definition. The trial court so construed it and instructed the jury that in order for them to find that the book in question was obscene it had to find the book to be utterly without redeeming social value.

Defendant also claims subsection (3) of ORS 167.151 makes the merit of the material a subject of affirmative defense rather than something for the state to disprove and therefore the statute is unconstitutional. The subsection has been construed to the contrary. See *State v. Watson,* 243 Or 454, 456, fn 2, 414 P2d 337 (1966). He also contends that the subsection makes matters of merit relevant to prurient interest, rather than a separate element of obscenity. As previously held herein, the lack of any redeeming social value is inherent in the judicial definition of obscenity adopted in *Roth* and subsequently used by the Oregon legislature in the statute.

Defendant also contends that subsection (4) un-

constitutionally permits a presumption of scienter from the contents of the cover and back of the book. The cover and back of a book are parts of the whole. Defendant wishes to treat them as something apart. We see no justification for so considering them. Their usual purpose is to portray in a general way that part of the book between the covers for the benefit of prospective customers. A seller who displays the cover makes a representation to the public of the book's contents. Evidence of what is on the cover is therefore relevant to a seller's knowledge of the contents. His knowledge of the book's contents is relevant to whether he knows the book is obscene. The cover and back are a form of circumstantial evidence which would be relevant even in the absence of a statute. A modest cover is relevant in showing that a seller was not likely to have any knowledge of obscene contents. The converse is also true. The Supreme Court of the United States has recognized that the manner in which written material is presented and sold is relevant in determining the issue of obscenity. *Ginzburg v. United States, supra.*

Defendant next contends that there was insufficient evidence upon which to base a conviction because the state introduced no evidence, other than the book itself, on the issue of appeal to prurient interests. Defendant argues that the average jury or judge is not competent to determine whether material of the type in question has prurient appeal. Defendant cites in support of his position *United States v. Klaw*, 350 F2d 155 (CA 2d Cir 1965), and *Dunn v. Md. Bd. of Censors*, 240 Md 249, 213 At2d 751 (1965). In *Klaw* the material was of such a bizarre nature that its prurient appeal to a normal person would be extremely doubtful

in the absence of technical testimony. *Dunn* recognizes that material can have such patent prurient appeal as not to require expert testimony. However, both held that under the facts of the particular case expert testimony was necessary. This court can visualize that where it is claimed that material has prurient appeal to a deviant group, it might be necessary to have expert testimony concerning the type of material that has such appeal to that group. There is no such contention in this case. The material in question is so patently and exclusively sexual that the average trier of fact is capable of recognizing whether it would have sufficient appeal to arouse lustful desires and lascivious thoughts in the average person. The Supreme Court of the United States has never indicated that expert testimony in this field is an absolute constitutional requirement.

The defendant also contends that the evidence was insufficient to permit a conviction because there was no expert testimony that the book went beyond national contemporary community standards of candor relating to the description of sexual matters and because there was no expert testimony negating any redeeming social value. He argues that the court and jury are unable to determine these matters without the benefit of expert testimony. The United States Supreme Court has not held that expert testimony of this kind is a constitutional requirement. We believe expert testimony is not required. The background and experience of the average juror would sufficiently reveal the tolerable level of candor in the contemporary national community. The time has long passed when a juror's experience was limited to the happenings and attitudes of his local community. The average juror is constantly

in touch with the national scene, exposed to national publications, movies, television and radio. Every corner drug store has a book and magazine rack replete with publications distributed nationally which demonstrate the sexual candor tolerated by the public. We live in a mobile society whose freeways and airways carry people and ideas between its farthest points with great frequency and in a very short time. To say that the average juror is not cognizant of the contemporary national community and what it will tolerate is to deny the present mass dissemination of information. Under proper instructions, the jury is qualified to weigh a particular book or movie. The jury was properly instructed in this case that the standard to be applied was that of the national community.

With respect to expert testimony on the issue of the redeeming social value of the book, we can conceive of a case where the court and jury may not be qualified to evaluate the literary value or other redeeming social value of a particular publication, and, that in such cases, expert testimony may be necessary to assist the court and jury in evaluating the material. But this is not such a case. While it is true that the author attempted to impose a superficial moral in the last few pages of the book (most likely for the purpose of colorable compliance with the United States Supreme Court's requirement), the pseudo moral does not grace the book with salvaging virtue. The book does not suggest that it has any literary or historical value whatsoever.

In addition, there was evidence in the case available to supplement the jury's knowledge of national community standards and to guide it concerning social

value. The defendant himself introduced in evidence a number of books receiving judicial approval which had been highly controversial because they dealt extensively with sexual portrayals. The jury had these to compare with the book in question. They were: "Lady Chatterly's Lover," "Candy," "The Life and Loves of Frank Harris," "Tropic of Cancer," "The Group," and "Another Country." The jury was instructed by the trial court that these books could be considered by them as being within the limits of candor in the national community and that in order for defendant to be found guilty, the material in question had to be far and to a large degree beyond the limits of the community's tolerance. These books helped fill out the jury's frame of reference relative to both limits of candor and literary value or other social benefit.

The defendant cites the case of *Dunn v. Md. Bd. of Censors, supra*, for the proposition that expert testimony is required with respect to each element of obscenity in order to comply with the Constitution. We do not recognize the *Dunn* case as properly interpreting the requirements of the Constitution. It is interesting to point out, however, that *Dunn* recognized that in some cases no expert testimony would be required when the nature of the book or film leaves no doubt as to its obscenity (213 A2d, at 754).

Defendant also contends there was no evidence from which the jury could find that defendant knew the book was legally obscene. In order for one to be found guilty of selling an obscene book it is not necessary to prove that someone saw him read it. The following statement is found in *Smith v. California*, 361 US 147, 154, 80 S Ct 215, 4 L ed2d 205 (1959):

"* * * Eyewitness testimony of a bookseller's

> perusal of a book hardly need be a necessary element in proving his awareness of its contents. The circumstances may warrant the inference that he was aware of what a book contained, despite his denial."

Also see *The People v. Sikora*, 32 Ill2d 260, 204 NE2d 768, 771-882 (1965). While there was no showing that defendant had read the book, evidence of its cover and its display to the public by defendant, which have heretofore been detailed, was available to the jury and provides a permissible basis for the jury's finding that defendant knew the nature of the book's contents. There was also other evidence relevant to defendant's scienter. The officer purchasing the book testified he prefaced the transaction by asking defendant where he kept his "dirtier" books, and that he was shown the rack from which the book in question was selected. There was testimony that the defendant told the officer that he got the worst books from out of town and they were kept in that group. After his arrest defendant told the officers he did not sell such books to persons under 18. There was sufficient evidence to support a finding of scienter.

Defendant claims that a retail bookseller should not be subject to prosecution because, if he is, he is required to be a censor of what the public reads. A bookseller may not put his head in the sand and claim he is an ostrich. *Smith v. California* and *People v. Sikora, supra.* This contention is equivalent to saying that a bookseller is immune from prosecution absent a prior determination of a book's obscenity. We do not believe this is or should be the law.

Defendant also contends that the court committed error by admitting into evidence the testimony of a

police officer relative to his conversation with defendant immediately prior to defendant's arrest. Prior to this conversation the book in question had been purchased and submitted to the grand jury, an indictment had been returned and a warrant for defendant's arrest had been issued. By pre-arrangement, an officer in plain clothes preceded the arresting officer for the purpose of engaging defendant in conversation to see if any incriminating statements could be secured before he was taken into custody. It is the admission of evidence of this conversation which defendant charges was error. The state concedes that any incriminating statement secured under such circumstances would have been violative of defendant's rights to counsel under the Sixth Amendment to the United States Constitution. *Massiah v. United States*, 377 US 201, 84 S Ct 1199, 12 L ed2d 246 (1964). The state urges, however, that the evidence was not prejudicial. The testimony was as follows:

> "A * * * I asked Mr. Childs at the time if he had a book in the store by the name of—went by the title of LESBIAN ROOMMATES. Mr. Childs stated that, no, he was sold out of it. He stated that he had gotten this book in, LESBIAN ROOMMATES, at the same time he had gotten in the book BEDS OF LESBOS.
>
> "Q Go ahead, please.
>
> "A Mr. Childs told me that—or stated to me that he was going to have to reorder LESBIAN ROOMMATES because it was a good seller.
>
> "He then pointed out another book in the store that went by the name of CANDY and stated that this book had been written in France and he also pointed out a book by the name of FANNY HILL which he stated was the best seller he had in the store."

We hold the testimony to be non-prejudicial. Its only possible prejudice would be as an admission that defendant stocked and sold the book. We construe defendant's opening statement as an admission that he sold the book. There was no reasonable possibility that the evidence complained of might have contributed to defendant's conviction. *Fahy v. Connecticut*, 375 US 85, 86-87, 84 S Ct 229, 11 L ed2d 171 (1963); *State v. Jones*, 242 Or 427, 410 P2d 219 (1966). The testimony was completely innocuous and non-prejudicial.

Defendant has many other assignments of error which we have considered and believe to be without merit.

The judgment of the trial court is affirmed.

O'CONNELL, J., dissenting.

For the reasons expressed in my dissent in *State v. Jackson*, 224 Or 337, 356 P2d 495 (1960), it is my opinion that ORS 167.151 violates Article I, § 8 of the Oregon Constitution and therefore the statute must be declared void.

APPENDIX B

Oregon Revised Statutes:

167.151 Disseminating obscene matter. (1) No person shall knowingly disseminate obscene matter. A person disseminates obscene matter if he exhibits, sells, delivers or provides, or offers or agrees to exhibit, sell, deliver or provide, or has in his possession with intent to exhibit, sell, deliver or provide any obscene writing, picture, motion picture, device, record, material or other representation or embodiment of the obscene.

(2) As used in subsection (1) of this section, matter is obscene if, considered as a whole, its predominant theme appeals to prurient interest and if it is patently offensive and goes substantially beyond the customary limits of candor in describing or representing such matter with reference to ordinary persons.

(3) In any prosecution for an offense under this section, evidence shall be admissible, as relevant to a determination of whether or not the predominant theme of the matter appeals to prurient interest, to show artistic, literary, scientific or educational merit of the matter.

(4) In any prosecution for a violation of this section, it shall be relevant on the issue of knowledge to prove the advertising, publicity, promotion, method of handling or labeling of the matter, including any statement on the cover or back of any book or magazine.

(5) Violation of subsection (1) of this sec-

tion is punishable by imprisonment in the county jail for not more than six months, a fine of not more than $1,000, or both.

Constitution of the United States:

AMENDMENT I

Freedom of religion, speech, and press; right to assemble and petition. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT V

When prosecution to be by presentment or indictment; double jeopardy; self-incrimination; due process; compensation for property taken for public use. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI

Rights of accused in criminal prosecutions.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

AMENDMENT XIV

Section 1. Citizenship; privileges and immunities; due process; equal protection. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPELLANT'S PETITION FOR REHEARING BY THIS COURT OF ITS OPINION AND DECISION OF NOVEMBER 20, 1968, AFFIRMING THE JUDGMENT OF CONVICTION AND SENTENCE OF THE TRIAL COURT.

Appellant contends that the majority of the Court erred in the following respects:

I

This Court has applied *Redrup* differently than has the United States Supreme Court and other courts throughout the country. The paperback novel "Lesbian Roommates" cannot, for First or Fourteenth Amendment purposes, be distinguished from "Lust Pool" and "Shame Agent" held not obscene in *Redrup* v. *New York*, 386 US 767, 87 S Ct 1414, 18 L ed 2d 515 (1967) reh den 388 US 924, 87 S Ct 2091, 18 L ed 2d 1377; from "Sex Life of a Cop" held not obscene in *Aday* v. *United States*, 388 US 447, 87 S Ct 2095, 18 L ed 2d 1309 (1967); from "Lust Job" held not obscene in *Books, Inc.* v. *United States*, 388 US 449, 87 S Ct 2098, 18 L ed 2d 1311 (1967); from the eleven Nightstand books, "Lost in Lust She Became a Passion Addict! SIN HOOKED," "Wanton Passion Was the Secret of These--BAYOU SINNERS," "Wild Passions Brought Them Shame and Pain! LUST HUNGRY," "He Worked Bodies of Marble and Sin in his SHAME SHOP," "Her Body was the Ticket to a Shame Career! FLESH-POT," "Her Act Was a Fake but Her Lust Secrets Real! SINNERS SEANCE," "In a Sin Jungle of Voodoo Lust She Was the--PASSION PRINCESS," "They Lived Their Twisted Life of Lust as--PENTHOUSE PAGANS,"

"Twisted Hungers Were Placed on Sale in This--SHAME MARKET," "In a Passion Camp of Lust He Ruled as--SIN WARDEN," "Passion Drove Him on a Lust Hunt to Vengeance! FLESH AVENGER," held not obscene in "*A Quantity of Copies of Books, et al.* v. *Kansas*, 388 US 452, 87 S Ct 2104, 18 L ed 2d 1314 (1967) from "Sin Servant," "Lust School" and "Lust Web" held not obscene in *Keney* v. *New York*, 388 US 440, 87 S Ct 2091, 18 L ed 2d 1302 (1967); from "Campus Mistress" and "Born to Be Made" held not obscene in *City of Chicago* v. *Kimmel*, 31 Ill 2d 202, 201 NE2d 386 (1964); from "Orgy House," "Passion Puppett" and "The Lust Circuit" held not obscene in *Ballantyne* v. *Gordon Stanley Hogue*, Cal Super Ct, Tulare County, No. 59666 (1964); from "Sex Scholar" held not obscene in *People* v. *Frank*, Los Angeles Municipal Court, No. W33846 (1965); from "Lesbian Sin Song," "Two Women in Love," "Lesbian Captive," "Lesbians in White," "The Girls at Wendy's," "The Three-Way Apartment," and "Honey Lips" held not obscene in *People* v. *Luros, et al.*, Cal Super Ct, LA County, No. 295183; from the books held not obscene in *Grant and Wissman* v. *United States*, (CA 9, 1967) 380 F2d 748, from "Candy" held not obscene in *Commonwealth of Pa.* v. *Dell Publications, Inc.* (1967), 427 Pa 189, 233 A2d 840; from "Naked Lunch" held not obscene in *The Attorney General* v. *A Book Named "Naked Lunch"* (1965), 351 Mass 298, 218 NE2d 571, and in *People* v. *Galanti*, Los Angeles Municipal Court, No. W33845 (1965); from "Sex Kitten," "Clipjoint Cutie," "The Wild Ones," "The Hottest Party in Town," "Passion Pit," "Bedroom at the Top," "Butch"

and "College for Sinners" held not obscene in *People* v. *Birch*, 40 Misc 2d 626, 243 NYS2d 525 (1963); and from "Strange Breed," "Pagan," "Swing Low Sweet Sinner," "Sex Plan," "A Rage Within," "Horizontal Secretary" and "None But The Wicked," held not obscene in *People* v. *Druss et al*, Indictment No. 43163 (New York S Ct, Queens County, Criminal Term (1963).

Subsequent to the oral argument in this Court and appellant's furnishing his memorandum of additional authorities immediately prior thereto, there was published the decision of the 8th Circuit Court of Appeals reversing convictions of authors and publishers (not retail dealers) for the mailing and transporting of alleged obscene literature consisting of nudist magazines and "paper-backed 'pocket book' publications dealing with fictional lesbian and heterosexual exploits. * * * so-called lesbian books, including "Three-Way Apartment," which are indistinguishable from "Lesbian Roommates." *Luros* v. *U. S.*, (CA 8, 1968) 389 F2d 200.

Further, the Portland jury in the present consolidated cases failed to find any of the other seven so-called "Lesbian books" obscene, including the book, "Beds of Lesbos" sold by appellant. Similarly, a jury in Klamath Falls, on remand, in January 1967, found the book, "Lust Pad" not obscene in *State* v. *Watson*, (see 243 Or 454, 414 P2d 337).

II

Even assuming, however, that after eight months of careful reading and comparison of "Lesbian Roommates" with "Lust Pool" and "Shame Agent" this Court could

properly draw between them the "dim and uncertain line" which separates obscenity from constitutionally protected expression (See *Bantam Books* v. *Sullivan*, 372 US 58, 83 S Ct 631, 9 L ed 2d 584, 590 (1963). Appellant, a retail cigar store operator selling such books cannot, consistent with due process of law, be compelled at risk of criminal conviction "to know" (scienter) how this Court might ultimately draw that line on a specific book.

III

It is inconsistent with due process requirements of the Fourteenth Amendment and the Constitutional standards for judging obscenity enumerated by the Supreme Court, to render a judgment of conviction against an accused without proof in the record that the accused knew the contents of the material or believed that the material involved violated the law, and where books of a similar character have been held to be constitutionally protected.

IV

The ruling of the Court that the State need offer no evidence of contemporary community standards other than the books themselves and that the jurors themselves could furnish such evidence in the jury room, without being subjected to cross-examination, applies due process requirements of the Fourteenth Amendment differently in Oregon than elsewhere in the country.

Thus, on November 14, 1968 the Supreme Court of California (en banc) in the case of "In re *Albert J. Giannini and Kelley Iser on Habeas Corpus*, Crim. No. 11446, 72 Cal R 655, 446 P2d 525 (1968), granted a writ of habeas corpus to set aside criminal conviction of a topless dancer

and of the manager of the night club in which she danced, on the express ground that the State must introduce proof of customary community standards, to determine both whether the dance appealed to prurient interests and whether it offended accepted standards of decency. The Court expressly held that it could not assume that the "jurors in themselves necessarily express or reflect community standards; we must achieve so far as possible the application of an objective, rather than a subjective, determination of community standards." Further, because the appellate reviewing court must reach an "independent decision as to the obscenity of the material" it held that at least the California Supreme Court "does not in any sense compose a "cross-section of the community" whereby it could effectively carry out the function of determining community standards "in the absence of evidence in the record directed toward proof of the community standard." ~~A copy of that portion of the California Supreme Court decision dealing with due process requirements of evidence is attached hereto as Appendix "A."~~

So too in *Luros* v. *U. S.*, (CA 8, 1968) 389 F2d 200, in dealing with lesbian books like "Lesbian Roommates" the Court held it improper to permit a conviction to stand without "independent evidence of prurient appeal *and* patent offensiveness," concerning which the government did not "offer any competent evidence outside of the books themselves." (389 F2d at 205)

The State of Oregon should not exclude itself as different from the remainder of the United States in applying federal due process requirements to obscenity prosecu-

tions. Mr. Child's guilt or innocence should not be different in Oregon than in California, Iowa, New York or Maryland.

V

The constitutionally improper testimony of appellant's "admissions" was offered in evidence by the State, over objection, for the express purpose of proving appellant's scienter. The State in its closing arguments so urged the jury so to consider it; not as the Court stated in its opinion, *solely* on the question of whether "appellant stocked and sold the book." Thus, when the issue was argued before the trial court, the colloquy between counsel made it clear that the State pressed, over appellant's objections, to introduce the testimony relating to the conversations and activities of the defendants because it "shows the knowledge of the defendant" (Tr. 142-147). Further, the trial court expressly permitted this entire line of testimony because he ruled it "relevant to the question of scienter" (Tr. 144).

Then in his final argument, the prosecuting attorney referred, as proof of scienter of appellant, to the very testimony which this Court on pages 12 and 13 of its opinion says could not reasonably "have contributed to defendant's conviction":

> "[MR. HAMPTON] * * * He knew full well what was going on, and they are ready to make a buck until they get hit.
>
> "Oh, I didn't know. I thought it was as bad as this.
>
> What else do you expect them to say? Consider what they said before they came into the courtroom. That is the best evidence and that's the believable evidence.

Again, CANDY sells well. I will leave to you whether CANDY represents this community's customary limits of candor and whether it, in fact, itself does not in its predominant theme appeal to the prurient interest" (Tr. 902).

Now, that was Officer Prunk's statement as to what Mr. Hayse said, and let's look at Mr. Childs.

Mr. Childs is alleged to have said that, "Well, these were good sellers."

Of course, they were good sellers, and what is that significant for?

He says, "Well, I'm out of them now, but here's a couple of good sellers. Here's CANDY. That sells well."

Is there anything untruthful about that? No. (Tr. 875).

* * * * *

They characterize the books in their own words, they come into court, they are going to stop and leave it at that?

No. They've got to try to rescue the case. They've got to try to make the books appear to be something different *from what they wanted the purchaser to think of them as being* (Tr. 898).

"[HAMPTON] Guilt or innocence is a matter for this jury, and I ask you to look at it as such. I ask you to view the believable evidence *which came from the mouths of these defendants themselves.* Leave mercy, if there is to be mercy, to the Court.

What do we hear from defendant Childs? He says LESBIAN ROOMMATE, good seller. It is a good seller. He would have to reorder it. He said he got it at the same time he got another— * * * Well, there was a young officer in here who testified that. I don't want to mislead you in any respect. The young officer testified about coming to talk with Childs *just before the arrest.* He told the young officer, as I recall, and you rely on your memory of it, and I'm not reading from a transcript. These are some notes that I have for the purpose of argument, and I don't pretend that they are a transcript.

When I do read from a transcript, I will turn to it and if there is any question about it, it will be cleared up.

First of all, let's get back to what he said. I submit he's testified by the young officer: "A good seller."

Comes into court and tells you that he doesn't really know much about it, but he says a good seller, has to reorder, got at the same time as BEDS OF LESBOS, in other words, these two books.

Before he comes into court, he is pleased to talk about them and to tell any would-be customer, an officer now, whose identity as an officer had not been revealed at this time, to tell a would-be customer, "These are good sellers; make money on them." Come into court and pretend his hands are tied by something called the distributor.

Before he comes into court, *he knows what is selling good.* He knows what he has to reorder; comes into court and pretends that his hands are tied by a distributor, and I ask you to bear in mind, because the believable evidence is that which is given without trying to think of what you're going to say in court, or what you're going to have your experts say in court.

Let's continue to examine the facts:

Before trial, and it appears clearly that each defendant was deliberately pandering in what he wanted the people to believe were trash, dirty books, bad ones, dirty sex books. That's what he wanted the public to believe" (Tr. 845-848). (emphasis supplied)

The use of this testimony to prove appellant's scienter was rendered even more egregious when the Court improperly delegated to the jury the function of speculating on the obscenity or non-obscenity of the comparison books placed in evidence, rather than instructing them on the non-obscene status of such materials, including the book "Candy." (See Assignments of Error Nos. 19 and 20, App. Br. 133 through 139.) Further the error was aggravated

by the court's prohibiting appellant's expert witnesses from testifying about "Fanny Hill" in relation to contemporary community standards and to exclude the book itself from evidence, particularly when appellant Childs made reference to "Fanny Hill" in the constitutionally inadmissible testimony offered to prove his scienter. (See Assignments of Error Nos. 17 and 18, App. Br. 124-133).

Obviously if the jury was free to consider "Candy" and "Fanny Hill" to be obscene, in spite of court rulings to the contrary, then testimony that appellant had "compared" "Lesbian Roommates" with "Candy" and "Fanny Hill" would clearly be evidence from which the jury was permitted to find scienter. In the face of such record, to state that such testimony was "non-prejudicial" and "there was no reasonable possibility that the evidence complained of might have contributed to defendant's conviction" is unsupportable. *Chapman* v. *California*, 383 US 956, 87 S Ct 824, 17 L ed 2d 705 (1967).

CONCLUSION

WHEREFORE, appellant petitions the Court to grant a rehearing, reconsider its opinion and decision, and reverse the judgment of conviction entered below.

Respectfully submitted

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Attorney for Appellant

SUPREME COURT, U. S.

MAR 8 1969

JOHN F. DAVIS, CLERK

In the

Supreme Court of the United States

October Term, 1968

No. 1054

HAROLD G. CHILDS,
Petitioner,

vs.

STATE OF OREGON,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

BRIEF FOR RESPONDENT IN OPPOSITION

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March 7, 1969

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OPINION BELOW

The majority and dissenting opinion of the Supreme Court of the State of Oregon (App. A of Petition) is reported at 87 Or. Adv. Sh. 495, ___ Or. ___, 447 P.2d 304 (1968).

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

Petitioner has stated most of the questions presented in non-objective fashion. Therefore respondent restates or accepts the questions presented as follows:

1. Did the Supreme Court of Oregon properly apply *Redrup v. New York*, 386 U.S. 767 (1967), rehearing denied 388 U.S. 924, *Aday v. United States*, 388 U.S. 447 (1967), *Books, Inc. v. United States*, 388 U.S. 449 (1967), *A Quantity of Books v. Kansas*, 388 U.S. 452 (1967)?

2. Petitioner's statement accepted.

3 and 4 (combined). Is proof that the petitioner, a cigar store clerk, was aware of the nature of the allegedly obscene book sufficient proof of scienter of obscenity even though he may not have actually read the book? Is testimony of the purchaser that he asked petitioner where he kept his "dirtier" books, that petitioner indicated a shelf in the rear of the store and stated that he obtained "all of the worst ones" from out of town and kept them there, and that the purchaser bought two paperback books with lurid covers highly suggestive of the sexual nature of the content of said books, sufficient proof of scienter?

5. Is it consistent with due process of law and the constitutional standards for judging obscenity to permit Oregon to convict petitioner without offering expert testimony as to contemporary community stan-

dards, prurient appeal of the book taken as a whole, customary limits of candor and lack of social importance?

6. Does the use of petitioner's statements obtained subsequent to indictment but prior to arrest require reversal under *Chapman v. California*, 386 US 18 (1967)?

7. This question is not raised in the body of the Petition.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional and statutory provisions involved are correctly stated by the petitioner.

STATEMENT OF THE CASE

The facts as stated by petitioner are accepted. His conclusions and opinions are not accepted. While respondent does not wish to burden the Court with an entire restatement of the case, respondent does wish to point out the following:

1. Petitioner's statement that "The impetus for the prosecution came from the 'Citizens for Decent Literature' (Tr. 45-54, 60)" (Petition 5) is the product of a self-serving imagination which is unsupported by the record.

2. Petitioner claims that respondent's proof of sci-

enter "consisted solely of placing the book 'Lesbian Roommate in evidence." (Petition 6.) This statement is false. At the time of purchase, seven weeks prior to the issuance of the indictment, a police officer entered the petitioner's store and asked him where he kept his "dirtier" books. The petitioner responded by showing the officer a group of books on the back wall. The petitioner said that he got all of the "worst ones" from out of town and kept them in that group (Tr. 243, 244). While it is inferable that the petitioner arranged the books on the racks, there was proof that the petitioner viewed the books as he made the sale (Tr. 246 and 247).

3. Respondent disputes the conclusions of petitioner regarding the nature of the consolidated trial on page 9 of the Petition. Respondent denies that all these books were "substantially the same" and that the evidence of scienter was identical as to all five defendants. Respondent further points out that the jury returned its verdict as to the four defendants rather than as to the eight books. People rather than books were tried.

REASONS FOR DENYING THE WRIT

I

The Oregon Supreme Court properly applied *Redrup v. New York.*

The Oregon Supreme Court applied the standards of

Redrup v. New York, 386 U.S. 767 (1967), in the only way possible. It obtained copies of "Lust Pool" and "Shame Agent" and compared them to "Lesbian Roommate," the book in question in this case:

> "We have examined other available contemporary 'pulp' books such as 'Lust Pool' and 'Shame Agent' which were approved in *Redrup v. New York*, 386 US 767, 87 S Ct 1414, 18 L ed2d 515 (1967), and find the book under present consideration to have been written with considerably less restraint." (87 Or. Adv. Sh. at 501, set out at page A-7, App. A of the Petition.)

The fact that the Oregon Supreme Court's comparison did not result favorably to the petitioner is no basis for petitioner's complaint.

With all respect to the role of this Court, *Redrup* provides no standards to apply other than its unadorned conclusion that "Shame Agent" and "Lust Pool" were not obscene. The Supreme Court of Oregon applied *Redrup* in the most conscientious fashion possible, by comparison of the actual books involved.

To grant the writ of certiorari on this ground would result in yet another obligation of the Supreme Court to examine an individual book, already examined by nine lower judges, and render an individual opinion regarding that book. Summary affirmance or reversal would add nothing to the body of the law and provide

no enlightenment below. If the writ were granted with a view toward express explanatory comparison of "Lesbian Roommate" against the standards of *Roth v. United States*, 354 U.S. 476 (1957), then the resultant opinion would be of much assistance to all parties to obscenity prosecutions and respondent certainly would not resist. The tendency of the Supreme Court to function merely as an additional judicial weighing device of each individual piece of allegedly obscene material, a function exemplified by *Redrup v. New York*, *supra*, and its progeny, is unfortunate and should be curtailed.

II

The Oregon Supreme Court applied the proper standard of scienter of obscenity. It held that there was sufficient proof from which to infer that the petitioner was familiar with the nature of the book he sold.

It is seldom possible to prove that a bookseller charged with dissemination of obscenity has actually read the book involved. Indeed a store owner who promotes, as did the petitioner, a whole rack of "the worst" books from "out of town," is most unlikely to have read each of the books in that rack. Yet there is surely no automatic immunity for volume dealers. Obscenity laws are aimed at the specific antisocial conduct of the knowing purveyance of obscene material. One may knowingly deal in obscene material if he is aware of the ob-

scene nature of his material. Such awareness can come through various circumstances other than the actual reading of the book involved.

Thus the Oregon Supreme Court predicated its opinion as to scienter on the following statement from *Smith v. California*, 361 U.S. 147, 154 (1959):

> "* * * Eyewitness testimony of a bookseller's perusal of a book hardly need be a necessary element in proving his awareness of its contents. The circumstances may warrant the inference that he was aware of what a book contained, despite his denial."

Also see *People v. Sikora*, 32 Ill.2d 260, 204 N.E.2d 768, 771-772 (1965). The Oregon court held that the *Smith v. California* standard was met by the inferences available from evidence that when the purchasing officer asked where he kept his "dirtier" books, the petitioner directed him to the back of the store where, in petitioner's words, he kept the "worst ones" which he got from out of town, evidence that after his arrest the petitioner stated that he never sold such material to juveniles and also by the evidence of the book cover itself which was observed and handled by the petitioner at the time of the purchase and, presumably, at the time he arranged the books on the rack (see pages A-3 to A-4, and A-14, App. A of the Petition). The lurid front and back covers

of the book are designed to suggest to customer and dealer alike the prurient nature of its content. Thus as in *Ginzburg v. United States*, 383 U.S. 463 (1966), a much more aggravated case, the petitioner was in " 'the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of [his] customers'," 383 U.S. at 467, and both the court and the defendant were entitled to take the advertised "evaluation at its face value." 383 U.S. at 472.

III

Expert testimony, while admissible, is not essential to establish whether the predominant theme of a book taken as a whole appeals to the prurient interest (unless designed to appeal to a deviant sexual group), national community standards of candor and redeeming social worth.

The prosecution offered testimony that the book was purchased from the petitioner. It further offered the book itself into evidence. "Lesbian Roommate" deals almost exclusively with generally known heterosexual and homosexual activities. The state offered no expert testimony in its case in chief. The petitioner was allowed to offer expert testimony as to what it considered to be the predominant theme of a book, contemporary national community standards of candor and the existence of social importance in the writing. The jury, by its verdict, disagreed with the expert testimony.

As a matter of first principle, respondent points out that it disputes petitioner's reference to books in other cases being "identical" with "Lesbian Roommates." (Petition 13. See also Petition 2, 3, 9 and 10.) No two books are precisely the same and each must be judged on its own merits. Otherwise we would need neither experts nor jurors.

To the issue, the best formulation of the rule is that found in the A.L.I. Model Penal Code § 251.4 (4),[1] under which expert testimony is admissible but not required. The position of the trial court and of the Oregon Supreme Court were basically in accord with the A.L.I. rule. There is no constitutional reason to carve a particular exception from the general proposition that ex-

---

1. (4) *Evidence; Adjudication of Obscenity.* In any prosecution under this Section evidence shall be admissible to show:

(a) the character of the audience for which the material was designed or to which it was directed;

(b) what the predominant appeal of the material would be for ordinary adults of any special audience to which it was directed, and what effect, if any it would probably have on conduct of such people;

(c) artistic, literary, scientific, educational or other merits of the material;

(d) the degree of public acceptance of the material in the United States;

(e) appeal to prurient interest, or absence thereof, in advertising or other promotion of the material; and

(f) The good repute of the author, creator, publisher or other person from whom the material originated.

Expert testimony and testimony of the author, creator, publisher or other person from whom the material originated, relating to factors entering into the determination of the issue of obscenity, shall be admissible. The Court shall dismiss a prosecution for obscenity if it is satisfied that the material is not obscene.

pert testimony is required only where the matter to be evaluated is beyond the ability of the non-specialized members of the community to evaluate and not otherwise. Where people of normal experience are able to conclude, expert testimony is improper.

The opinion below is in accord with the rule in *United States v. Klaw*, 350 F.2d 155 (2d Cir. 1965). Basically *Klaw* holds that where the issue is prurient appeal to the average man, we may assume that the jurors are representatives of that class and able to act independently of experts but that where the issue is the existence of prurient appeal to a deviant class we must hopefully assume that most jurors require expert testimony because they are not themselves knowledgeable regarding deviant sexual behavior.

The reading of "Lesbian Roommate" demonstrates that it deals with elemental rather than esoteric sexual practices. Therefore under *Klaw* the jurors were able to judge the material without expert testimony. Further, it is unclear just what sort of credentials would qualify an expert on prurience.

As to national community standards of candor, in this day of nationwide electronic, journalistic and dramatic communication, of travelling artistic exhibits and high literacy as well as geographical mobility, there is no reason to assume that the jurors are unaware of the

contemporary standards of candor of the national community of which they are members. See Whyte, *Expert Testimony in Obscenity Litigation*, 1965 Wisconsin L. Rev. 113. Petitioner had the opportunity through use of his own experts to fill the gaps, if any, in the jurors' familiarity. He has no cause to complain.

Evidence of the book alone is sufficient to show that it contains no social, literary or artistic merit whatever. One need only read the book to come to that conclusion. The petitioner claimed it had certain merit and attempted to demonstrate that through the use of expert testimony. They testified primarily from the addition of a happy and moral ending that "Lesbian Roommates" was possessed of social merit in that it demonstrated the superior values of heterosexual over homosexual love. The jury was as free to reject the evidence of petitioner's witnesses as it would be to disbelieve any other evidence.

Were this Court to require that the prosecution pad its case with expert testimony, the result would be simply to open another area for the creation of a predictable class of plaintiff's and defendant's experts. For example see the list of witnesses in *McCauley v. Tropic of Cancer*, 20 Wis.2d 134, 121 N.W.2d 545 (1963), set out at 1965 Wis. L. Rev. at 123. It is no trick to assemble a group of people with credentials in various fields who have absolute views about censorship or absolute views

about "filth" who will testify willingly and predictably on either side of an obscenity prosecution. Realistically, there is little probative value to expert testimony in an obscenity trial.

The petitioner's experts in this case, despite their high minded purpose, vividly demonstrate the negligible value of expert testimony in the area of obscenity. One of the petitioner's witnesses for example, a college literature professor, feels very strongly that there should be no obscenity laws (Tr. 496-497). He found redeeming merit in each of the books on which the indictment is based. For example, he described Exhibit 2, a novel entitled "Her Raging Needs," as:

> "* * * one of my favorite stories. This is a book I'd like sometime to teach to a class, a select class interested in knowing what bad writing really is." Tr. 380-381.

Another professor of literature called by the petitioner to testify as to community standards of candor testified that in his view obscenity simply does not exist:

> "* * * I do not believe that the term obscenity has any substantive meaning of its own. It is, in my view, a legal fiction. It's a label you put on something if you want to censor it." Tr. 754.

The issue then is whether this Court should grant the

writ in order to consider whether or not to require the state in subsequent cases to find and call to the stand a selection of college professors, ministers and other certificated people more fundamental than those called by the defense. Respondent submits that they would be of no more help to the jury nor to the court in its search for the law than were those called by the petitioner in this case.

IV

The "blurbs" in advertising on the cover and back of a book or magazine are relevant evidence in an obscenity prosecution.

Oregon Revised Statutes 167.151 (4)[2] provides only that the statements on the cover or back of books or magazines are "relevant" evidence of scienter. Petitioner's statement (Petition 16) that the statute permits a "presumption" of scienter from such evidence is false as is demonstrated by a reading of the statute. Under *Ginzburg v. United States*, 383 U.S. 463 (1966), it is clearly admissible as circumstantial proof of scienter and even of obscenity itself.

---

2. "(4) In any prosecution for a violation of this section, it shall be relevant on the issue of knowledge to prove the advertising, publicity, promotion, method of handling or labeling of the matter, including any statement on the cover or back of any book or magazine."

V

The Oregon Supreme Court correctly applied the "harmless error rule" of Chapman v. California in regard to statements made by petitioner after indictment and prior to arrest.

The finding of the Supreme Court of Oregon that the error, if any, was harmless finds support in the Petition and in the brief filed by petitioner in the Supreme Court of Oregon.

Petitioner argues that the evidence was not harmless because the prosecutor argued it to the jury (Petition 17). Yet petitioner also points out that he was tried on two separate indictments, each charging the sale of a different book of similar type and that he was convicted under one indictment but the jury was hung as to the other (Petition 9). If the prosecutor's argument were as influential as petitioner claims, the jury would have convicted him on both charges or neither charge. The Petition virtually concedes the point by alleging, among other things, "* * * the evidence of scienter as to the five defendants (including statements solicited from all five in violation of *Massiah*) was also substantially identical as to all defendants," yet petitioner was the only jointly tried defendant who was convicted.

Petitioner emphasizes on certiorari that which he minimized on direct appeal to the Supreme Court of

Oregon. At page 12 of Appellant's Brief in the court below, petitioner characterized the statements as follows:

> "These so-called 'statements' amounted to nothing more than the following: [There follows a description simliar to that in the Petition.]."

The Supreme Court of Oregon did no more than accept petitioner's own characterization of the significance of the evidence. This court should do the same.

This case hardly provides the sort of raw material which would be desirable for re-examination of the holding or application of *Chapman v. California*, 386 U.S. 18 (1967), or *Fahy v. Connecticut*, 375 U.S. 85 (1963).

CONCLUSION

For the foregoing reasons it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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